

225254



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Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street SW
Washington, D.C. 20423-0001

Re: Finance Docket 35148, King County, Washington - Acquisition Exemption - BNSF
Railway Company

Dear Ms. Quinlan:

In the above-captioned matter, I enclose All Aboard Washington's petition for leave to file and reply to the reply of King County, Washington.

We wish to receive copies of any filings related to the enclosed protest. For that purpose kindly note my address information.

Respectfully,

Lloyd H. Flem

Lloyd H. Flem
Executive Director

225254

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

FINANCE DOCKET 35148

**KING COUNTY, WASHINGTON
- ACQUISITION EXEMPTION -
BNSF RAILWAY COMPANY**

**PETITION FOR LEAVE TO FILE
REPLY TO REPLY OF KING COUNTY, WASHINGTON**



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Communications with respect to this
document should be addressed to:

Lloyd H. Flem
Executive Director
All Aboard Washington
P.O. Box 70381
Seattle, WA 98127

Dated: June 17, 2009

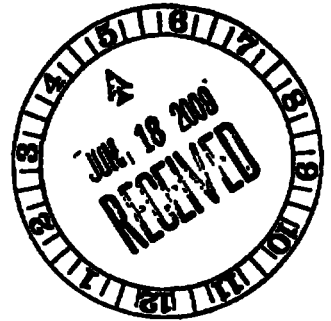
BEFORE THE SURFACE TRANSPORTATION BOARD
Washington, D.C.

STB FINANCE DOCKET NO. 35148

KING COUNTY, WASHINGTON
- ACQUISITION EXEMPTION - BNSF RAILWAY COMPANY

PETITION FOR LEAVE TO FILE

REPLY TO REPLY OF KING COUNTY, WASHINGTON



Pursuant to 49 C.F.R. 1117.1, All Aboard Washington hereby petitions for leave to seek consideration of its protest in this matter, filed April 8, 2009, and to file this response to the reply of King County, Washington (the reply), filed in this matter on April 28, 2009. We request relief under 49 C.F.R. 1117.1 because the procedural requirements of 49 C.F.R. 1104 tend to limit participation by the general public, including volunteer organizations such as All Aboard Washington, and because good cause exists to consider the arguments we are respectfully presenting.

The reply asserts that the Board has previously granted requests to acquire the right to reinstitute rail service (the restart right) from the abandoning railroad. In the Ohio case cited in the reply (*Norfolk & Western Rwy Co. - Aban. - St. Marys and Minster in Auglaize County, OH*, 9 I.C.C.2nd 1015-1020 [1993]) (*Auglaize County*), the restart right had remained with the Norfolk & Western Railway Co. (N & W) at the time of the railbanking, in 1990. It was never transferred to the ITU, say nothing of having been transferred to the ITU in conjunction with the railbanking, in a manner analogous to that requested by King County (the County) in its petition for an exemption from 49 U.S.C. Section 10901 (the petition), in the instant matter. In *Auglaize County*, after the fact of the railbanking, a rail service provider, R.J. Corman Railroad Company (Corman), "sought and obtained an exemption in STB Docket No. FD-32294 to . . . acquire N & W's right to reinstitute rail service" (*Auglaize County* at 1019), and had purchased the requisite assets and interests of N & W, including the restart right, in order to institute common-carrier service on the subject line. Corman thus acted as N & W's successor-in-interest in the case in question. We therefore see *Auglaize County* as devoid of precedent for the restart right conveyance sought in the petition.

Likewise, in the second case cited in the reply (*BG & CM R., Inc. - Exemption from 49 U.S.C. Subtitle IV*, STB Docket no. FD-34399) (the BG & CM case), the restart right had remained with the railbanking railroad, Camas Prairie Railnet (Camas) at the time of railbanking in 2000. BG & CM Railroad, Inc. (BG & CM), a rail service provider, was substituted as the ITU by a Board decision served in 2003 in the abandonment proceeding for the line (Docket no. AB-564) BG & CM, a rail service provider, subsequently argued that "the transfer of . . . [the railbanking railroad's] rail assets under the CITU and/or the parties' private Trails Act agreement carried not only the right to establish a trail but the right to reactivate rail service as well" (Decision in STB Docket nos. FD-34399 and -34398 at 5). While the petition correctly cites that decision as illustrating the Board's exclusive power to transfer a restart right, the Board refused to effect that transfer to BG & CM as ITU, stating instead that BG & CM was acquiring the right to operate by virtue of the Board's separate approval of the exemption requested from provisions of 49 U.S.C. Subtitle IV that apply to carriers. BG & CM had acquired track, ties, related material, and sufficient real estate for purposes of operating a railroad from Camas, and can thus be viewed as the successor-in-interest to Camas. The County

has not filed for such a Subtitle IV exemption as a carrier, inasmuch as its request for exemption is based on a non-carrier acquisition. It does not provide rail service. The BG & CM case therefore lacks all relevance to the instant case, beyond its illustration of the Board's authority over the disposition of the restart right.

Common to *Auglaize County* and the BG & CM case is the acquisition of the restart right by an entity conducting essentially the same activity as the railbanking railroad. That is, the events and Board decisions reflect the continuity of interest between the railbanking railroad and the successor railroad company. These circumstances do not apply to the County, which therefore cannot cite these cases as precedents in support of the petition. Rather, in clear contrast, the petition calls for conveyance of the restart right contemporaneous with railbanking, to an ITU with no interest in providing rail service. For that reason the case would establish a precedent inimical to the purposes of the railbanking legislation.

In the course of preparing this filing, it was brought to our attention that the County's situation more closely resembles that of the City of Coeur d'Alene, Idaho (the City), which in 2006 sought authorization to acquire the restart right from a railbanking railroad in *City of Coeur d'Alene - Acquisition and Operation Exemption - Union Pacific Railroad Company* (STB Docket no. FD-34980). In that case the City cited the BG & CM case much as the County has in the instant case, but the Board refused the authorization, stating that the City "is not a rail carrier and has provided no basis to enable the Board to find that the City is either able or willing to reactivate rail service" (*Decision, STB Docket no. FD-34980* at 1). The decision reaffirmed the established practice, whereby only a rail service provider may acquire the right to reinstitute rail service. The County is not a rail service provider. Noting that we are not legal professionals with a ready familiarity with such precedents, we request leave to cite this case, given that it is relevant to the instant case, as part of this response to the reply of the County,

In view of the above, we respectfully request that the Board reject the petition.

Respectfully submitted,



Lloyd H. Flem
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Dated: June 17, 2009

CERTIFICATE OF SERVICE

I, Lloyd H. Flem, hereby certify that a true and correct copy of the within protest has been served by first-class U.S. mail mailed this 17th day of June, 2009, on the following counsel of record:

Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
Attorney for King County, Washington


Lloyd H. Flem
Executive Director
All Aboard Washington.